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IN THE

Supreme Court of the United States

October Term, 1969

No. 1290

JAMES A. MURRAY and EDITH B. MURRAY,
partners, doing business as
NASSAU CHINA COMPANY,
Petitioners,

v.

THE HONORABLE ROY W. HARPER,
Judge of the United States District Court for
the Eastern and Western Districts of Missouri,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
The Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The very fact [Opp. Br. 2] that the brief in opposition was prepared by counsel for L. G. Balfour Co. at the request of and on behalf of the respondent judge, Hon. Roy W. Harper, highlights the critical problem in this case. In the context of a proceeding that challenges the impartiality of the respondent judge, he has seen fit to employ as

his counsel before this Court the attorneys for the private party whose cause he has allegedly favored. In so doing, he has engaged in "ex parte discussions with [such] counsel," aligned "himself even temporarily with one side in pending litigation,' and thus further emphasized "the appearance of loss of impartiality" – all of which procedure was condemned by the Third Circuit in *Rapp v. Van Dusen*, 350 F.2d 806, 813-814 (1965).[1] Such a consequence of assuming a litigant's position has been deemed "unfortunate" by this Court. *Ex parte Fahey*, 332 U. S. 258, 260 (1947). But in a case where the propriety of the judge's participation is under question, such involvement can only add to "the appearance of loss of impartiality," an appearance that is at the very heart of 28 U. S. C. § 144.

But wholly apart from the partisan stance exhibited before this Court by the respondent judge, the brief in opposition reveals quite vividly the appropriateness of granting certiorari. Time and again the brief (see pp. 14, 15,

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[1] Instead of employing partisan counsel who represent the party in whose favor he is allegedly biased, the respondent judge could have obtained independent personal counsel or left his defense before this Court to one of the litigants before him. See *Ex parte Fahey*, 332 U. S. 258, 260 (1947). He could also have filed his own brief statement or remained silent. See *United States v. Smith*, 331 U. S. 469 (1947). Or he could have requested representation by the United States Attorney or the Solicitor General. See *Platt v. Minnesota Mining Co.*, 376 U. S. 240 (1964).

Moreover, under Rule 21(b) of the Federal Rules of Appellate Procedure, the defendant L. G. Balfour Co. was deemed a party to the mandamus proceedings in the Eighth Circuit "for all purposes" and hence entitled to appear before this Court as a party in interest with respect to the petition for certiorari. See also Rule 31(3) of the Rules of this Court. Copies of the petition for certiorari were duly served on the Solicitor General and on counsel for L. G. Balfour Co.

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16, 17, 18, 20, 21, 22) disputes the merits of petitioner Murray's allegations of bias and prejudice, asserting that some of those representations "are untrue" and that none "state any fact or reason which gives fair support to the charge of personal bias or prejudice in the mind of respondent." Moreover, certain of the references in that brief to the affidavits of prejudice are inaccurate, such as the repeated statements (Opp. Br. 4-5, 6, 7) that the petitioners had charged improprieties to Judge Hunter – who has never been assigned to the Balfour cases.[2]

Respondent's brief illustrates how easily involvement by the accused judge in ruling on his own disqualification can assume the appearance of a direct personal confrontation between judge and litigant on an issue that in such a context is inevitably demeaning for the court. It was precisely such a confrontation that § 144 and *Berger* intended to avoid. By "giving an automatism to the affidavit which overrides everything," said this Court in *Berger*, 255 U. S. at 33, § 144 removes from the accused judge "the delicate and trying duty of deciding upon the question of his own disqualification."

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[2] The petitioners at no time have alleged any improprieties on the part of Judge Hunter. The only significant mention of Judge Hunter in the affidavits filed below (see paragraph 32 of Exhibit A attached to Murray's original affidavit of prejudice) related to Judge Oliver's attempt in 1968 to persuade the antitrust plaintiffs that it was in their interest that Judge Oliver continue to preside over these cases – otherwise, said Judge Oliver, the cases might be assigned to Judge Hunter who, in Judge Oliver's words, was not as "plaintiff minded" as Judge Oliver, was not professionally qualified to try antitrust cases, and disliked plaintiffs' counsel. The plaintiffs had no reason to adopt or share these derogatory remarks.

At this juncture of the case, petitioners do not deem it appropriate to answer other misstatements or misinterpretations in the brief in opposition relative to the assertions in the Murray affidavits. Such erroneous comments in the brief do not affect the appropriateness of the grant of certiorari.

The judge is thereby saved from becoming personally embroiled in the many major and petty factual disputes which are possible on the disqualification issue, such as those set forth in the brief in opposition. The automatism of the affidavit transfers such issues and any dispute as to the truth, substantiality or sufficiency of the allegation of prejudice away from the § 144 disqualification proceedings to a subsequent and altogether different arena in which the judge personally is no longer a contestant. There the focus is on the conduct not of the judge but of the affiant and his counsel. There they may find themselves required to defend against disciplinary and penal sanctions for having made and certified untruthful or frivolous charges of bias against the judge. See *Berger*, 255 U. S. at 33.

Thus the criticisms of the affidavits, advanced on behalf of Judge Harper before this Court in the brief in opposition, can have relevance under the *Berger* ruling only in the context of some effort to punish petitioners or counsel for abusing the privilege of securing an automatic disqualification under § 144. Significantly, no such effort has been made.

This urge to adjudicate the merits of the allegations of bias, which permeates both the opinions of Judge Harper and his brief before this Court, has so infected the lower courts that the plain meaning of § 144 and the *Berger* ruling has been lost. Those courts and Judge Harper have sought to treat the motion for disqualification and the supporting affidavit as documents to be "submitted for decision and the exercise of judicial judgment upon them," like other motions and their supporting evidence. But such treatment of the motion and affidavit was precisely the position advanced by the Government in *Berger* and expressly rejected by this Court. 255 U. S. at 30-31. And somewhat surprisingly, the post-*Berger* decisions have failed to recognize their own resurrection of this discredited position, perhaps because the matter was not urged

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before them. In any event, the discrepancy that has emerged between the *Berger* ruling and the subsequent lower court rulings is so gross, and involves so recurring a problem, that the grant of certiorari becomes appropriate here to permit a re-evaluation of the problem and an elimination of the discrepancy.

Particularly is a resolution of the problem appropriate in the context of multi-party litigation. Where, as here, there are numerous party plaintiffs in separate but related lawsuits, is each such party entitled to one automatic disqualification? Or does the one-affidavit rule of § 144, which permits "a party" to file "only one such affidavit in any case," allow only one affidavit by the combined parties in multi-party litigation? None of the cases cited by Judge Harper in his opinion below or in his brief in opposition (p. 25) faces up to or answers that question. Nor does Judge Harper's opinion or brief refute the constitutional due process question that arises if a co-plaintiff is denied the right to seek disqualification of a successor judge who, subsequent to the disqualification of his predecessor on the basis of a §144 affidavit of another plaintiff in a separate case, exhibits a new and different pattern of prejudice against him. The complaint in that brief in opposition (p. 26) that no multi-party litigation could be administered efficiently and justly if successive disqualification of judges were permitted finds its complete refutation in the sanctions available for abuse of the disqualification principles – sanctions that can be utilized in either single-party or multi-party situations.

A final few words should be added with reference to Judge Harper's complaint (Opp. Br. 20) that it would be difficult to find any federal judge who was not at one time a member of a leading social or professional fraternity. However true that statement may be, it does not appear by reason of its truth or otherwise that there will be any scarcity of qualified judges to sit in the Balfour

cases by virtue of the operation of § 144. This is not a proceeding to disqualify a judge under 28 U.S.C. § 455 for having a substantial interest in the case or being connected with a party to the case. This case involves, rather, 28 U.S.C. § 144, and that section permits only one disqualification to each party for bias and prejudice and that section is activated only in the discretion of the affected party.

To illustrate the limited impact of the principle petitioners here urge, a total of eleven federal judges – three identifiable circuit judges and eight district judges – have been assigned either to preside over or to hear an appeal in some one or more of the 15 substantially identical cases filed against Balfour and the fraternities by the plaintiffs, who have been represented by the same counsel.[3] Many of those judges conceivably may have been fraternity members. But the plaintiffs have filed disqualification affidavits against only two of the eight district judges.

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[3] The 11 cases in the Western District of Missouri have been successively assigned first to Judge Duncan, then to Judge Oliver, then to Judge Collinson, and finally to Judge Harper. The *Meyers* case in the Central District of California (see Petition, pp. 7, A-19) was, after Judge Hill recused himself, assigned to Judge Pregerson. The two cases filed on October 7, 1967, in the District of Massachusetts by two of the Kansas City plaintiffs were assigned to Judge Julian and are currently pending before him. In addition, in June of 1967, *Rader v. L. G. Balfour Co., et al.*, was filed in the Northern District of Illinois and assigned to Judge Napoli, who thereafter dismissed the action on Balfour's motion. This dismissal was appealed to the Seventh Circuit and, on May 13, 1969, three judges of that court heard the oral argument; the appeal is now under advisement.

Thus, except for Judge Oliver and the two judges (Collinson and Harper) against whom affidavits of bias have been filed, there has not been the slightest suggestion of any belief on the part of any plaintiff or any of plaintiffs' counsel that any of the judges above identified were disqualified by reason of possible fraternity membership or otherwise to act on the cases before them.

Moreover, the fact of fraternity membership was only one of several "facts and reasons" listed in the affidavits filed with reference to the two district judges. Indeed, the first affidavit filed below by petitioner Murray against Judge Harper made no mention of all of the judge's fraternal connection, which was then unknown to Murray. Even in Murray's second affidavit, after the connection had been revealed, the allegation of bias related to far more than mere membership. Rather it concerned (1) Judge Harper's failure to reveal such membership following the disqualification of two prior judges because of such membership, (2) his membership in a fraternity which, on a gratuitous claim that its "rights" were in jeopardy by reason of charges substantially the same as those involved in the instant litigation, had deliberately injected itself into the Seventh Circuit proceeding to take Balfour's side in the appeal from the F.T.C. decision against Balfour, and (3) his membership in a fraternity that, while not named as a defendant in petitioner's complaint, is named as a defendant in all other proceedings that the respondent judge has treated as related in nature.[4] It is in those circumstances that disqualification should have been ordered in this case.

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[4] The respondent's complaint [Opp. Br. 18] that petitioners erroneously represented in the petition for certiorari that Delta Theta Phi is a named defendant in the instant *Murray* case is misplaced. The petition made clear (see p. 11) what the record shows – that "while Delta Theta Phi had not been expressly named in the original complaints in the various Balfour cases, it had been so named in the various amended complaints, including the one which petitioners obtained leave to file." Thus, while petitioners did not file an amended complaint, the other antitrust plaintiffs did so file and named Delta Theta Phi as a defendant. Delta Theta Phi is thus a named defendant in the Balfour litigation, in which Judge Harper concedes [Opp. Br. 24; Petition A-6, A-7] the *Murray* case forms an integral component.

The brief in opposition (p. 27) concludes with the observation that "if it should be the disposition of the Court to accord 28 U.S.C., § 144, the automatism urged by petitioners herein, then the efficient administration of justice would require that the writ issue and the matter be heard and resolved by this Court at this stage of the litigation rather than be deferred until after further proceedings are had in these cases." Implicit in that statement on behalf of Judge Harper is (1) a recognition that petitioners' position respecting the automatic nature of the disqualification procedure of § 144 is both rational and respectable, and (2) a recognition that this important problem should be resolved here and now.

Indeed, this Court's decision in the *Berger* case supports both of those considerations. As should now be evident from the petition for certiorari, the *Berger* ruling, despite the contrary interpretations of most lower federal courts and of Judge Harper, can most fairly be construed as according an automatism to § 144, a result in accord with the somewhat sparse legislative history. Moreover, *Berger* made plain that questions concerning the disqualification of a trial judge should be resolved prior to the trial, the Court stating that "the remedy by appeal is inadequate." 255 U.S. at 36. Such inadequacy is particularly evident in the instant Balfour cases, where the first of 11 separate and consecutive trials is now scheduled to commence late in 1970. A substantial waste of judicial time will ensue, to say nothing of the energies and expenses of the parties and their counsel, if the disqualification issue were to be deferred to the appeal stage and were then to be resolved as petitioners now urge. Indeed, in that event the financial resources of the antitrust plaintiffs would have been so depleted by the pre-trial proceedings and by the useless trial proceedings as to render it impossible for them to proceed anew before a qualified judge; the antitrust remedies would then have been rendered illusory.

Judge Harper is entirely correct in stating that "the efficient administration of justice would require that the writ issue and the matter be heard and resolved by this Court at this stage of the litigation." Opp. Br. 27.

For these reasons, supplementing those in the petition for certiorari, the writ should issue to review the judgment of the Eighth Circuit in this proceeding.

Respectfully submitted,

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